

lovine v Metropolitan Transp. Auth.

2014 NY Slip Op 30169(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 401194/09

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 401194/2009
IOVINE, ANTHONY JOSEPH
vs.
METROPOLITAN TRANSPORTATION
SEQUENCE NUMBER : 004
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for amend BIP - vacate
Notice of Issue, compel disc
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1
Notice of X.M.
Answering Affidavits — Exhibits _____ No(s) 2, 4
Repeating Affidavits _____ No(s) 5

Upon the foregoing papers, it is ordered that this motion is cross motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/16/14

[Signature] J.S.C.

HON. ARLENE P. BLUTH

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

JAN 23 2014

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

COUNTY CLERK'S OFFICE
NEW YORK

-----X
ANTHONY JOSEPH IOVINE, as Administrator of the
Estate of JOSEPH J. IOVINE, deceased,

Plaintiff,

MS 0004

-against-

Index № 401194/09

METROPOLITAN TRANSPORTATION AUTHORITY,
MAGGIES PARATRANSIT CORP. and NANCY OCASIO,

Defendants.

-----X
ARLENE P. BLUTH, J.:

In this action for damages, plaintiff Anthony Joseph Iovine (Anthony Iovine), as Administrator of the Estate of Joseph J. Iovine, deceased (J. Iovine or decedent, as appropriate), moves for an order, pursuant to Article 31 of the CPLR, granting leave to serve a verified amended bill of particulars, and upon granting leave, deeming served the verified amended bill of particulars annexed to the motion papers. Defendants Metropolitan Transportation Authority (MTA), Maggies Paratransit (Maggies) and Nancy Ocasio (Ocasio) jointly oppose the motion and cross-move for an order, pursuant to CPLR 3126, precluding plaintiff from offering at trial any medical evidence from the previously undisclosed health providers, or in the alternative, for an order, pursuant to Uniform Rule 202.21 (e), vacating the note of issue and certificate of readiness, and striking this action from the trial calendar.

J. Iovine commenced this action by filing a copy of his summons and complaint in the office of the Kings County Clerk on or about December 15, 2008, to recover damages for injuries he allegedly sustained at approximately 1:30 p.m. on June 19, 2008, when he was struck by a paratransit motor vehicle while riding his motorcycle on Ocean Avenue between Avenues I and J

in Kings County. J. Iovine originally named MTA, Ocasio and an entity named Willis North America Inc. as defendants. Issue was joined by service of MTA and Ocasio's joint answer on or about January 26, 2009. At or about the same time, the MTA moved to have the action transferred to New York County, where it maintains its principal place of business. Plaintiff cross-moved for an order granting him leave to serve a supplemental summons and amended complaint joining Maggies as a defendant and deleting Willis North America Inc. from the caption, following the execution of a stipulation discontinuing the action as against that defendant only. By order dated April 30, 2009, the Honorable Martin M. Solomon granted both motions, and the file was, by order of the court, transferred to New York County where it was assigned a New York County index number, No. 401194/09, and placed on this DCM part's calendar.

According to J. Iovine's first bill of particulars, dated July 17, 2009, he sustained the following 24 physical injuries as a result of the accident: comminuted minimally displaced fracture of the left occipital condyle communicating with its articulation at C1; fracture of the transverse process of C7; disruption of the longitudinal ligament at C6-C7 level consistent with a tear and a mild tear from C2-C5; herniated nucleus pulposus at C7; listhesis at C6-C7; comminuted fractures of the first and third through 5th distal metatarsals of the right foot; fracture at the base of the third proximal phalanx of the right foot; right posterior herniation of L4-L5 intervertebral disc impinging upon the thecal sac and the right lateral recess causing severe stenosis of right neural foramen; right posterior herniation of the L5-S1 intervertebral disc impinging upon the thecal sac and the right lateral recess; concussion; loss of consciousness; post concussion syndrome; loss of feeling in the left thumb, index finger and long finger; decreased

sensation in the left C6 and C7 distribution; right shoulder tendinosis; restriction of motion of cervical spine; restriction of motion of the lumbar spine; restriction of motion of right foot; restriction of motion of the right shoulder; pain in neck; pain in the right foot; pain in the mid thoracic region; pain in the right shoulder; and headaches. It was also alleged that J. Iovine will develop traumatic arthritis in the cervical spine as a result of the injuries he sustained in the accident, and that he sustained an aggravation and/or exacerbation of the degenerative disc disease of the cervical spine, and a herniated disc at L5-S1, requiring a lumbar laminectomy and lumbar spinal fusion.

J. Iovine passed away on March 7, 2010, prompting counsel for plaintiff to move, under New York County motion sequence number 001, for an order substituting his son Anthony Iovine as administrator. The Honorable George Silver, before whom this matter was then pending, granted the motion and amended the caption to accurately reflect the substitution. Plaintiff served a second verified bill of particulars, dated October 26, 2011, adding claims of death and cardiac arrest to the 24 injuries previously alleged.

By order dated July 10, 2012, the court granted a motion by plaintiff, under motion sequence 002, to consolidate this action with another action brought by plaintiff against Maggies and Ocasio, under New York County index No. 105048/11. The two actions, which listed the same injuries in their respective bills of particulars, were consolidated under index No. 401194/09. Thereafter, on or about January 2, 2013, plaintiff filed a note of issue and certificate of readiness, triggering the placement of this matter on the trial calendar. On or about February 4, 2013, defendants served their joint motion, under motion sequence number 003, for a summary judgment dismissal of the complaint. The motion was denied by order dated August

21, 2013.

Prior to resolution of the summary judgment motion, on or about April 3, 2013, plaintiff served a motion for an order granting leave to serve an amended verified bill of particulars and deeming served the amended verified bill of particulars annexed to the motion papers (Original Submission). The amended bill of particulars identified 10 additional injuries as having been sustained by decedent as a result of the accident. These are: lumbar radiculopathy; cervical radiculopathy; right shoulder impingement syndrome; torn right labrum; torn right rotator cuff; left shoulder impingement; partial tear of the left rotator cuff; torn left labrum; restriction of motion of the left shoulder; and pain in the left shoulder (Additional Injuries). The allegations of death and cardiac arrest have been withdrawn, following a determination that the cause of J. Iovine's death was unrelated to the accident.

On or about April 12, 2013, defendants served their response to the motion, setting forth their objections to granting leave. Specifically, they argued that plaintiff failed to submit a medical affirmation and/or medical records to establish a causal connection between the Additional Injuries and the original accident, and they failed to provide a reasonable excuse for not seeking to add them to the bill of particulars until after the note of issue was filed.

Although plaintiff's Original Submission contains, on its notice of motion, the stamp of the New York County Clerk's Office, indicating that on either April 3 or 4, 2013,¹ the papers had been approved and that the requisite fee was paid, the motion was never given a sequence number and calendared by the court for consideration and resolution. When plaintiff's counsel

¹ It is difficult to make out, from the copy submitted at exhibit E to plaintiff's subsequent notice of motion, whether the date is April 3, 2013 or April 4, 2013.

discovered the administrative error, he re-served the motion which was then properly calendared and assigned as motion sequence number 004. In this notice of motion, dated June 25, 2013, plaintiff, once again, seeks an order granting him leave to serve an amended verified bill of particulars, and deeming served, the amended verified bill of particulars annexed to his motion papers.

The instant notice of motion and affirmation in support are substantially similar to those of the Original Submission, except that the current submission is supplemented with assertions and documentation not previously submitted, which address the concerns raised by defendants in their opposition papers of April 12, 2013. Plaintiff has submitted: a medical affidavit from Dr. Richard L. Parker (Dr. Parker) of South Nassau Orthopedic Surgery and Sports Medicine, P.C., purporting to establish a nexus between the Additional Injuries and the accident; a copy of a report from Queens Medical Imaging, P.C. (Queens Imaging) dated February 12, 2009, reporting the findings of J. Iovine's February 11, 2009 MRI of his lumbosacral spine;² and copies of seven medical authorizations for J. Iovine's medical records, executed and dated June 10, 2013, relating to the Additional Injuries.

Plaintiff asserts that his recent ability to advise defendants of the Additional Injuries and medical treaters, to seek leave to amend the bill of particulars, and to provide the medical authorizations, stems from his receipt of decedent's workers compensation records revealing the additional treatment received by J. Iovine. Plaintiff also asserts that defendants should not be surprised by the Additional Injuries, as they are not wholly unrelated to the type of impact-related

² Plaintiff has not attached any of the other testing results, films, or findings referenced in Dr. Parker's report.

injuries already alleged for which they had been provided with medical authorizations during discovery. Plaintiff also contends that defendants will not be prejudiced by the amendment of the bill of particulars to include the Additional Injuries because they can seek the relevant disclosure through the additional medical authorizations, adding that the mere exposure to greater liability does not constitute prejudice (*see Latino v Nolan & Taylor-Howe Funeral Home*, 300 Ad2d 631 [2d Dept 2002]). Lastly, plaintiff contends that the delay in seeking to amend the bill of particulars was not inordinate, as the note of issue had recently been filed on December 31, 2012.³ To this end, plaintiff cites to a series of cases in which, despite delays in seeking to add claims, leave to amend the bill of particulars was granted under circumstances in which the notes of issue had already been filed, and/or there was a lack of prejudice to the defendants, and/or there was no excuse offered for the delay (*see Selective Ins. Co. v Northeast Fire Protection Sys.*, 300 AD2d 883, 883-884 [3d Dept 2002]; *Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180, 181 [1st Dept 2002]; *Jordan v Aviles*, 289 AD2d 532, 533 [2d Dept 2001]; *Northbay Constr. Co. Inc. v Bauco Constr. Corp.*, 275 AD2d 310, 311-312 [2d Dept 2000]; and *Farrell v K.J.D.A. Corp.*, 244 AD2d 905, 905 [4th Dept 1997]).

Defendants oppose the motion and cross-move for an order precluding plaintiff from offering at trial any medical evidence from Dr. Parker, Dr. Francis Lanzone (Dr. Lanzone) and Queens Imaging on the ground that, despite discovery demands and several court orders directing them to do so, plaintiff failed to disclose these medical providers at any time prior to the filing of the note of issue and certificate of readiness. Specifically, by Case Scheduling Order dated

³ Court records indicate that the note of issue was filed on January 2, 2013.

December 8, 2009, plaintiff was directed to provide, by January 12, 2010, authorizations for his medical records, which comply with the Health Insurance Portability and Accountability Act of 1996 (HIPAA), for a period of two years prior to the accident and extending to the end of the litigation. Then, by so-ordered stipulation dated February 4, 2011, plaintiff was required to provide HIPAA compliant authorizations for all medical treatment, examination and testing within 45 days, with specific instructions that “all az’s [authorizations] for medical treatment & testing shall be for treatment conditions & testing related to the accident & all prior related injuries/conditions related to the same parts of the body plaintiff claims injured in this accident.” By order dated May 13, 2011, and again by order dated September 19, 2011, plaintiff was directed to provide authorizations relevant to the claims of injury.

It is undisputed that authorizations for Dr. Parker, Dr. Lanzone or Queens Imaging were not produced despite these court orders and plaintiff’s obligation to provide authorizations for any and all medical treatment records related his claims of injury not otherwise subject to a protective order (*see* CPLR 3101 [a]; *Gill v Mancino*, 8 AD3d 340, 340-341 [2d Dept 2004]). Describing plaintiff’s disclosure failures as willful and contumacious, and his justification for such failings, which includes blaming a lack of communication between J. Iovine and Anthony Iovine, as lacking in candor, defendants also oppose the motion based on the prejudice of having to defend against claims asserted after J. Iovine’s death. Alternatively, they seek an order vacating the note of issue and certificate of readiness, striking this action from the trial calendar, and re-opening discovery with respect to the Additional Injuries.

Upon examination of the parties’ arguments and submissions, the court is troubled by plaintiff’s counsel’s claims that he never knew about the shoulder injuries underlying the

majority of the Additional Injuries, despite being the individual who verified each of the bills of particulars, and it is clear that his explanations for the delay in seeking to add the Additional Injuries to the bill of particulars, constitute, in essence, law office failure. Nevertheless, it is well settled that leave to amend the pleadings shall be freely given at any stage of the proceedings “absent prejudice or surprise resulting directly from the delay” (*McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 [1983][citations omitted]; *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 398 [2d Dept 1995]), and despite defendants’ objections, there is no showing that they are prejudiced by the delay, rather than by increased liability exposure. Furthermore, while the approximately three-month delay in serving the Original Submission after the note of issue was filed was unfortunate, it was not inordinate, especially in light of the prior delays necessitated by the change of venue, substitution of the administrator, and consolidation proceedings.

It is undisputed that, due to his death on March 7, 2010, defendants did not have an opportunity to depose Joseph Iovine, or have him examined by a physician of their choosing (an independent medical examination, or IME) as to the 24 original claims of physical injury. It is also undisputed that, without the opportunity to conduct either a deposition or IME, discovery devices by which defendants are frequently able to uncover previously undisclosed medical treaters or conditions, defendants’ ability to uncover evidence of decedent’s Additional Injuries and/or his medical providers was hampered. Under these circumstances, plaintiff and plaintiff’s counsel’s obligation to be diligent in their compliance with court ordered discovery and provide all relevant medical authorizations, and to supplement or amend the bill of particulars, as appropriate, on a timely basis, was heightened and essential to both the prosecution and defense

of this action. And, as indicated above, while plaintiff's counsel's lapses in this regard were serious, they are not sufficient to demonstrate prejudice and deny leave to amend. Even if plaintiff had included the Additional Injuries in the original bill of particulars, or in a timely served amended bill of particulars, his death prior to his deposition and IME, causes the same degree of prejudice in defending against the Additional Injuries as it does for defending against the original 24 injuries. Their claim of prejudice, based on his untimely death, is unavailing, and a delay attributable to law office failure, where no prejudice is shown, should not defeat the rights of a plaintiff on whose behalf the action was brought and on whose behalf it continues to be prosecuted (*see Bell v Charles*, 26 Misc 3d 141[A], 2010 NY Slip Op 50342[U] [App Term, 1st Dept 2010]).

Moreover, defendants have not shown how they would be prejudiced by an additional period of discovery during which they will be entitled to pursue information about the Additional Injuries, as they did for the original 24 claimed injuries, deemed essential for their preparation for trial. However, contrary to plaintiff's assertions, the seven authorizations dated June 10, 2013, provided to defense counsel, are not sufficient. Given defendants' inability to depose or conduct a physical examination of J. Iovine, through no fault of their own, the HIPAA complaint medical authorizations must also authorize defendants to conduct *ex parte* interviews, pre-note as well as post-note, with J. Iovine's physicians, consistent with *Arons v Jutkowitz* (9 NY3d 393, 415-416 [2007]), which the current authorizations do not. Defendants may also be entitled to seek the depositions of one or more of decedent's physicians. Therefore, it is necessary and appropriate to grant that aspect of defendants' motion that seeks an order vacating the note of issue and certificate of readiness, and striking this action from the trial calendar in order to provide

defendants with adequate time to complete pretrial discovery.

Although 22 NYCRR 202.21 (e) requires that a motion to vacate a note of issue be served within 20 days after the note was filed, and precludes an untimely motion except for good cause shown, it was plaintiff's delay in moving to amend the bill of particulars that created the basis, or good cause, for defendants' otherwise tardy motion. It should also be noted that any further delays or failures by plaintiff to provide discovery on a timely basis will result in an appropriate order of preclusion.

Accordingly, it is

ORDERED that plaintiff's motion for leave to serve an amended bill of particulars is granted and the proposed amended bill of particulars attached to the motion papers is deemed served on defendants; and it is further

ORDERED that defendants' cross motion is granted only to the extent that the note of issue and certificate of readiness are hereby vacated and the case is stricken from the trial calendar; and it is further

ORDERED that within thirty (30) days from the entry of this order, plaintiff shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office, who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the courts; and it is further

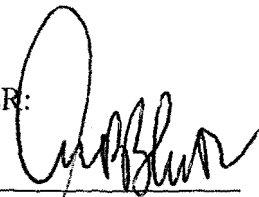
ORDERED that the parties shall appear for a discovery conference on April 7, 2014, in Room 103, Part 22 DCM, at 9:30a.m.; and it is further

ORDERED that all other relief not expressly granted is denied.

This is the decision and order of the Court.

Dated: January 16, 2014
New York, New York

ENTER:



J.S.C.

FILED

JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK